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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

JAMES VARGA,

Plaintiff,

v.

TWITCH INTERACTIVE, INC. a/k/a TWITCH.TV, INC.,

Defendant.

TWITCH INTERACTIVE, INC., ERRONEOUSLY NAMED AS TWITCH INTERACTIVE, INC. a/k/a TWITCH.TV, INC.,

Cross-Complainant,

v.

JAMES VARGA,

Cross-Defendant.

Case No. CGC-18-564337

DEFENDANT AND CROSS-COMPLAINANT TWITCH INTERACTIVE INC.'S TRIAL BRIEF

Dept.: 611
Judge: Curtis Karnow

Action Filed: February 14, 2018
Second Am. Cross-X Filed: January 7, 2019
Trial Date: June 13, 2019

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Cases

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Defendant and Cross-Complainant Twitch Interactive, Inc. ("Twitch") respectfully submits the following Trial Brief.

I. INTRODUCTION

This case arises out of Twitch's termination of a "Content License and Base Network Agreement" with James Varga, a celebrity in the video-gaming world who streamed videos of his gameplay through Twitch's content-streaming service. Following repeated violations of Twitch's rules and guidelines, which drew numerous warnings and penalties from Twitch, Varga committed one more violation that proved to be the final straw. He concocted a scheme using his Twitch channel as a vehicle to promote and profit from a potentially illegal third-party gambling website – in which Varga had an undisclosed financial interest. Varga lured Twitch users to this gambling site, where he exploited them by rigging jackpots in his favor. He did so in blatant breach of his obligations to Twitch and contrary to his assurances to Twitch that he would improve his conduct and observe its rules. When Twitch discovered the scam, in order to protect its users, it terminated Varga's contract and Twitch account, leading to this litigation. Varga sued Twitch for breach, intentional interference with contractual relations, and intentional and negligent misrepresentation; Twitch counter-sued for breach of contract and the covenant of good faith and fair dealing, negligent misrepresentation and fraud.

While the determination of liability lies ahead in this bifurcated action, the coming trial is narrowly focused on a single threshold issue: whether the limitation of liability provision in the contract between the parties is enforceable. To make this determination, the Court will need to make the following legal determinations based on well-settled law regarding the enforceability of limitation of liability clauses in California:

1. Is the limitation of liability provision ***procedurally unconscionable*** – meaning, is it oppressive or surprising as a result of unequal bargaining power between Varga and Twitch?
2. Is the limitation of liability provision ***substantively unconscionable*** – meaning, is it so one-sided as to "shock the conscience"?

If the answer to either question is no, then the inquiry is over; a contract must be *both* procedurally

and substantively unconscionable to be unenforceable.

Twitch will prove at trial that the limitation of liability provision is both procedurally *and* substantively conscionable. This is not the case of an unsophisticated employee being asked to sign away his rights via an onerous and non-negotiable contract with a big company, or of a consumer being forced to sign a hundred-page, ten-point font agreement in order to obtain needed services. This is the case of a startup video game streaming service provider trying to sign on a top player in that field by offering an attractive and negotiable opportunity for him to make money through his gameplay – which Varga happily accepted, to the tune of nearly $600,000.

To evaluate procedural unconscionability, the Court must consider the manner in which the contract was negotiated and the circumstances of the parties at the time, focusing on the factors of oppression (lack of choice) and surprise (hidden terms). To prove procedural conscionability, Twitch will introduce evidence that shows: (1) it provided Varga ample opportunity to review and negotiate the terms of his own contract, but Varga simply chose not to do so; (2) when he signed on to stream content on Twitch, Varga was an experienced and major player in the nascent online gaming content world and Twitch was a new start-up run by young entrepreneurs similarly trying to navigate this new phenomenon, putting the parties on relatively equal footing; (3) Varga's supposed feelings of urgency to sign the contract are based on nothing more than a "vibe" he now claims to have felt when presented with the opportunity to stream on Twitch, not on any concrete evidence in this case; (4) Twitch's content license agreements are negotiable, and Twitch was willing to negotiate its terms with Varga, had Varga asked any questions or raised any concerns; (5) there were alternative methods by which Varga could have distributed his gaming activity online, aside from Twitch's services; and (6) the limitation of liability provision is easily noticeable, in all caps, and contained in a brief, seven-page agreement.

To evaluate substantive unconscionability, the Court must evaluate the actual terms of the contract to determine not whether they are reasonable or unreasonable, but whether they are harsh, oppressive, and shock the conscience. Here, the contract speaks for itself; by its terms the limitation of liability provision applies equally to protect *both* Varga and Twitch from unbound liability. It is not a one-sided provision, and thus it certainly cannot be so one-sided as to shock

the conscience. Twitch, nonetheless, will show: (1) Twitch has never treated the limitation of liability provision (or other provisions incorporated into it by reference) as a one-sided term; (2) the $50,000 limitation of liability is a reasonable sum in comparison to Varga's monthly earnings from Twitch; and (3) other key provisions in the contract, such as the financial terms, were one-sided to the *benefit* of Varga because he ultimately made close to $600,000 through his partnership with Twitch, whereas Twitch actually lost money on the partnership. Finally, Twitch understands that Varga will allege that the limitation of liability provision is a liquidated damages clause. However, the provision does not seek to fix damages, but rather to cap them at $50,000. It is a fair and enforceable limitation on both parties' liability.

II. STATEMENT OF FACTS

A. James Varga and His Choice to Stream on Twitch

In or around 2011, both Varga and Twitch began live-streaming video game play content over the internet. For his part, Varga started streaming himself playing the video game League of Legends on Own3D.tv ("Own3D"), a platform for players and viewers to stream and watch live video game play on the internet, as his full-time occupation. Varga Trans. 35:22-38:14.[1] He quickly became one of the most popular streamers on Own3D. Varga Trans. 65:18-20. He built up a well-known brand using the alias "PhantomL0rd" when streaming his League of Legends gameplay, attracting between 500 and 5,000 viewers at any given time. Varga Trans. 65:2-14; 66:3-4; 68:2-5. During this period, video game streaming was in its infancy, but Varga became successful early on by monetizing his livestreaming and earning revenue when viewers on Own3D clicked on ads on his page. Varga Trans. 48:10-15; Howell Trans. 132:21-133:7.

In 2012, just a few months after Twitch's launch in the summer of 2011, Own3D was experiencing financial difficulties, leading Varga to consider switching over to Twitch. Varga Trans. 38:18-21; 76:23-77:6; 77:21-22; 83:17-19; Howell Trans. 145:7-13. Twitch provides services for video game players to stream and view broadcasts of gaming-related content as part of

[1] This brief cites to the deposition transcripts and exhibits of Twitch's Person Most Knowledgeable, John Howell, and Plaintiff, James Varga, for reference. The exhibits are included in Twitch's proposed trial exhibit list and Twitch will lodge the transcripts. Twitch can provide courtesy copies of these documents to the Court sooner upon request.

a social, interactive community. Second Amended Cross-Complaint, ¶ 1. Twitch was a small and brand new startup when Varga joined in 2012, but it provided streamers with an attractive opportunity through sharing revenues from user subscriptions and advertising. Howell Trans. 42:14-17.

On or around November 14, 2012, Varga communicated with Stuart Saw and Jason "Opie" Babo – former Own3D employees who had worked with Varga while there, but had since been hired by Twitch – about moving to Twitch. Varga Ex. 2. Saw and Babo made a compelling case to Varga, offering him front page exposure on Twitch's website, a one-time bonus of the nearly $8,000 (a sum which was then owed to Varga by Own3D), 70% of the revenue from each person who subscribed to his channel, a $5 CPM rate for advertising ("cost per mille," meaning the average amount earned for every 1,000 monetized views on his videos), timely payments, and a more stable streaming connection. Varga Trans. 86:17-87:16; 96:2-4; 96:20-21; 97:5-9; 97:14-98:4; 99:4-9; 127:14-25; 128:14-18.

Varga was excited about the deal and consulted his brother, Nick Varga, about it. Varga Trans. 88:15-17. In a lengthy email to his brother summarizing his conversation with Saw and Babo, Varga repeated these offer terms, without ever mentioning that he felt rushed or pressured to make the move. Varga Trans. 89:5-9; 90:11-91:23. Indeed, Varga told his brother that Twitch "sounds pretty good" and was a better "home for [him] and [his] streaming career, [and his] chat, and [his] fans." Varga Trans. 90:6-10; Ex. 2. Despite his success on Own3D and the availability of other competitor platforms for Varga to explore, including YouTube, Afreeka, and NicoNico, Varga opted for Twitch because of Own3D's financial troubles, the attractive deal that Twitch had offered (he had "bills to pay" and wanted to secure his career), and the fact that Twitch had "cool new features," more viewers, and more staff. Howell Trans. 35:11-20; Varga Trans. 99:20-101:2; 105:5-7.

After speaking with Twitch, but before receiving Twitch's content provider agreement, called a Content License and Base Network Agreement (the "Agreement"), Varga had time to conduct research about Twitch, its interface and structure, and his ability to port his audience to Twitch, review his records, calculate the amount of money that Own3D owed him (which Twitch

would pay Varga as part of the Agreement), and have a conversation with John Howell, who was then on Twitch's Strategic Partnerships team (and is now Vice President of Global Partnerships). Varga Trans. 116:3-19; 123:1-124:8; Howell Trans. 14:21-15:2.

B. The 2012 Agreement

Although Varga spent three days researching Twitch and speaking to Twitch employees and his brother about the opportunity to stream his content on Twitch, when Twitch finally sent Varga the draft Agreement (after Varga had to follow up and ask for it), Varga signed it quickly, without taking the time to read or review any part of it (including, apparently, his own representation and warranty that his content would "comply with all applicable laws, rules, and regulations…"). Twitch sent Varga the Agreement at 3:35 AM Coordinated Universal Time ("UTC") (8:35 PM Pacific Time) on November 17, 2012 via HelloSign, an electronic document signature program. Varga viewed the Agreement at 3:42 AM UTC and signed it less than thirty minutes later, at 4:08 AM UTC. Howell Ex. 2 (the Agreement) at 18.

The terms of the Agreement were very favorable to Varga. They included the terms Varga had discussed with Twitch: $5 CPM for advertising, 70% of the revenue from each person who subscribed to his channel (Twitch would receive only 30%), and a signing bonus/sponsorship bonus of approximately $8,000. Varga Trans. 96:2-4; 96:20-21; 97:5-9; 97:14-25; 98:1-4; 127:14-25; 128:14-18. This deal was better than what most streamers received: the usual subscription revenue split was 50% of subscription revenues (very few streamers got 70%), most streamers received a variable CPM rate as opposed to a flat rate like Varga, and a signing/sponsorship bonus was also unusual. Howell Trans. 74:9-17; 138:16-140:13; 142:23-143:1; Varga Trans. 127:14-22. In fact, Twitch lost money on its deal with Varga because of the "open ended" earning potential he had with the flat CPM rate. Howell Trans. 136:15-18; 138:16-140:13.

The Agreement also included a Limitation of Liability provision, which is in all caps and labeled "Limitation of Liability," within a section titled "Indemnity; Limitations of liability."

The provision appears as follows:

8.4. Limitation of Liability. EXCEPT FOR A PARTY'S OBLIGATIONS UNDER THIS SECTION (INDEMNITY), OR A BREACH BY A PARTY OF ITS OBLIGATIONS UNDER SECTION 6 (CONFIDENTIALITY), NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY: (a) FOR LOST REVENUE, LOST PROFITS, LOST BUSINESS, OR INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR EXEMPLARY DAMAGES (EVEN IF THAT PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES); OR (b) UNDER ANY THEORY OF LIABILITY, AN AGGREGATE AMOUNT EXCEEDING FIFTY THOUSAND US DOLLARS (US $50,000).

Howell Ex. 2 at 9-10. The provision applied mutually to both Twitch and Varga. Howell Trans. 106:22-107:2.

Although three days passed between Varga's initial call with Saw and Babo and his receipt of the Agreement, he did not ask any questions about or try to negotiate the terms of the Agreement. Indeed, he *had* no questions. Varga Trans. 104:12-14; 137:21-23. For example, Varga did not, at any point, ask Twitch how long he had to sign the Agreement, or tell them he needed any additional time to review it or run it by a lawyer. Varga Trans. 92:23-93:2; 93:19-94:4. Nor did he ask any questions about the financial terms or the indemnity provision before entering into the Agreement; he didn't even verify that they were what he had discussed with Saw and Babo. Varga Trans. 103:13-15; 124:9-13; 132:6-14.

Although Varga chose not to negotiate the terms, the terms of the Agreement were, in fact, negotiable. Howell Trans. 68:7-9; 69:7-8; 92:8-10; 123:11-20. Twitch regularly negotiated terms with its content providers, including financial and legal terms. Howell Trans. 70:7-13; 77:2-80:14; 106:11-14. The limitation of liability provision was no exception; it, too, was negotiable. Howell Trans. 92:4-10. Moreover, as noted above, Varga did negotiate with Twitch for a favorable subscription rate and a one-time bonus for the outstanding amount Own3D owed him.

Varga admitted in his deposition that Twitch never told him, via any medium, that it was necessary to expedite signing the agreement. Varga Trans. 130:15-20. In fact, *Varga* had to follow up and ask Twitch to send him the Agreement three days after his telephone call with Babo and Saw. Varga Ex. 3; Varga Trans. 110:25-111:25. Moreover, Twitch did not sign the Agreement until December 11, 2012, showing no urgency from Twitch to have the Agreement executed. Howell Ex. 2 at 18. During the nearly month-long period it took Twitch to counter-sign, Varga never asked any questions or raised any other issues regarding the Agreement.

C. The 2014 Amendment

On April 2, 2014, Twitch sent Varga an Amendment renewing the Agreement (the

"Amendment"). Varga Ex. 7. Varga did not execute the Amendment until twenty-two days later, on April 24, 2014. *Id.* On April 24, he opened the Amendment at 10:04 AM UTC and signed it a "couple seconds" later at 10:05 AM UTC. *Id.*; Varga Trans. 147:2-5. Although Varga claims he did not see the Amendment during these 22 days, the record is clear that no one at Twitch contacted him during that period to urge him to sign it. Varga Trans. 147:6-12; 147:20-148:2; 155:13-17.

By 2014, Twitch had modified its fee structure, adopting a model with variable CPM rates for different countries. However, Twitch allowed Varga to maintain a flat, non-variable rate of $5 CPM because he had gained immense success and became "top talent" with a large viewership, which meant that the original term was " more beneficial for him" and resulted in "open-ended earning potential [for Varga]." Howell Trans. 132:21-133:7; 134:16-18; 138:22-139:13; 144:10-13. Just as with the Agreement, Varga did not ask for any other specific term modifications, and did not request more time to review or sign the Amendment. Varga Trans. 150:10-16; 152:17-153:25; 156:8-157:9.

While at Twitch, Varga became one of Twitch's most popular streamers and highest earning partners, even doing an event in Berlin for ESGN TV, and gaining "lots" of sponsorships deals. Varga Trans. 52:2-53:2; 144:4-14; Ex. 6. Varga formed his own corporation to manage his sponsorship deals and income. He invested some of this income on his own, including in companies, like CSGOShuffle, the gambling website he promoted on his Twitch channel.

Varga did not consider leaving Twitch at any time. Varga Trans. 150:17-25. Since Twitch terminated Varga's account, he has continued to stream and post videos of his gameplay on YouTube, gaining revenue from his approximately 400,000 subscriber/fan base. Varga Trans. 38:22-39:2; 39:23-40:8; 41:10-17; 41:25-42:14; 81:6-22.

III. ARGUMENT

The limitation of liability provision in the parties' Agreement should be enforced. "[A] limitation of liability clause is intended to protect the wrongdoer defendant from unlimited liability… Clauses of this type 'have long been recognized as valid in California.'" *Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1126 (citing

Markborough Cal., Inc. v. Super. Ct. (1991) 227 Cal.App.3d 705, 714). Limitation of liability clauses are presumptively enforceable; the challenging party must show unconscionability in order to overcome this presumption. *Id.* Unconscionability has procedural and substantive elements; *both* must appear for a court to invalidate a contract or one of its individual terms. *Roman v. Super. Ct.* (2009) 172 Cal.App.4th 1462, 1469. California Courts view these two factors on a sliding scale: the less substantively unconscionable a provision is, the greater the showing of procedural unconscionability is required, and vice versa. *Id.*

Here, the Agreement is neither procedurally nor substantively unconscionable. Varga had an opportunity to review and negotiate the terms of the Agreement, whether or not he chose to do so. Indeed, Twitch regularly negotiated agreements with its content providers and agreed to modifying certain terms from time to time – and Varga was an experienced player in the industry, fully capable of negotiating a contract. Varga also had the opportunity to stream his gaming activity on other platforms, and thus was not forced into a "take-it-or-leave-it" agreement with Twitch. Moreover, the terms of the Agreement were more favorable to Varga than Twitch, and the limitation of liability provision applies mutually to protect both parties.

A. The Agreement is Not Procedurally Unconscionable

Procedural unconscionability concerns the manner in which the contract was negotiated and the circumstances of the parties at that time, focusing on factors of (1) oppression and (2) surprise. *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1319 (internal citation omitted). Oppression may arise from an inequality of bargaining power of the parties to the contract ***and*** an absence of real negotiation or a meaningful choice on the part of the weaker party. *Id.* It refers not only to an absence of power to negotiate the terms of a contract, ***but also*** the absence of reasonable market alternatives. *Id.* (finding no procedural unconscionability because plaintiff failed to allege he could not have obtained merchant credit card services from another source on different terms and was not under immediate pressure to obtain the services). Procedural surprise focuses on whether the challenged term is hidden in a prolix printed form or is otherwise beyond the reasonable expectation of the weaker party. *Id.* at 1321.

Because procedural unconscionability must be measured on a sliding scale with

substantive unconscionability, the determination is not simply "*whether* procedural unconscionability exists, but more importantly, *to what degree* it may exist." *Id.* at 1319. Even adhesion contracts,[2] for example, are not per se oppressive. *Id.* at 1320 (citing *California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 214). The enforceability of an adhesion or form contract, like any other contract, still depends on the elements of oppression and surprise. *Perdue,* 38 Cal.3d at 925. Neither is present here, especially given the circumstances of the parties, which were relatively equal at the time they negotiated the contract, and the fact that, contrary to Varga's suppositions, the contract was not offered on a take-it-or-leave-it basis.

1. Neither the Agreement Nor the Circumstances of Its Negotiation Was Oppressive

Varga cannot establish that the Agreement or the circumstances surrounding its execution were oppressive. In evaluating oppression, Courts generally consider the following factors: (1) lack of negotiation; (2) inequality of bargaining power; and (3) lack of meaningful choice based on those circumstances. *See Crippen v. Central Valley RV Outlet, Inc.* (2004) 124 Cal.App.4th 1159, 1165. As explained above, oppression refers not only to an absence of power to negotiate the terms of a contract, but also to the absence of reasonable market alternatives. *Morris*, 128 Cal.App.4th at 1320. "[T]he 'oppression' factor of the procedural element of unconscionability may be defeated, if the complaining party has a meaningful choice of reasonably available alternative sources of supply from which to obtain the desired goods and services free of the terms claimed to be unconscionable." *Id.* (citing *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 772); *see also Simulados Software, Ltd. v. Photon Infotech Private, Ltd.* (N.D.Cal. 2014) 40 F.Supp.3d 1191, 1198 (agreement not unconscionable in part because the plaintiff "was free to contract with any other software provider to create a Mac-compliant version of its software"); *Marchante v. Sony Corp. of Am., Inc.* (S.D.Cal. 2011) 801 F.Supp.2d 1013, 1022

[2] An adhesion contract is "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Morris*, 128 Cal.App.4th at 1319 (citation omitted). A "contract of adhesion is fully enforceable according to its terms unless certain other factors are present which, under established legal rules ... operate to render it otherwise." *Id.* (citing *Perdue v. Crocker Nat. Bank* (1985) 38 Cal.3d 913, 925). The Agreement here was not an adhesion contract, because Varga had the opportunity to negotiate its terms. Even if it were, however, it would not be unconscionable for the reasons set forth herein.

(no procedural unconscionability where there were no allegations that plaintiffs "lacked other options for purchasing high-definition televisions").

The Agreement here was far from oppressive: (1) Varga had the opportunity to review and negotiate the terms of the Agreement, but aside from negotiating the key financial terms, he elected not to do so; (2) Varga was not the "weaker party" at the time he entered the Agreement, but rather an experienced and well-known participant in the emerging space for video game streaming who Twitch was pursuing to provide content for its relatively new services; and (3) Varga had meaningful choices with respect to his video game content, including reasonably available alternative streaming outlets.

a. Varga Had the Opportunity to Negotiate the Terms of His Contract, but Never Reviewed It

The record establishes unequivocally that Varga had ample opportunity to review and negotiate the Agreement, but did not do so:

- Varga was presented with a business opportunity to join Twitch as a content provider by two individuals he trusted and had experience working with at Own3D. Varga Trans. 88:15-25; Ex. 2 (summary of initial conversation with Stuart Saw and Jason "Opie" Babo); 103:13-15 ("I trusted Opie and Stuart").
- He had several days to evaluate the opportunity, which he did, including through consultation with his brother. *See* Varga Trans. 103:7-104:14, 116:3-117:19; Ex. 4 ("I have been doing m[y] research and have been very impressed! That and the fact that my trust in Opie/Stuart to also switch has really made me happy about it =)").
- Three full days after his initial call with Twitch about the opportunity, Varga reached out to Howell, asking him to send the agreement he'd discussed with Saw and Babo. Varga Trans. 130:21-131:8; Ex. 3 ("Hey John [¶] Just a friendly reminder about the partner agreement…").
- When Twitch sent the Agreement the following day, Varga did not review it. Varga Trans. 124:6-8 ("Q And then when you received the agreement, did you review it? A No."). He did not ask for any amount of time to consider it (Varga

Trans. 92:23-93:21, 138:6-14), he did not ask if he could review it with an attorney (*id.* at 138:15-139:5), and he did not ask to modify any terms (*id.* at 137:24-138:5). In fact, he did not ask a single question about it. *Id.* at 137:1-23. Indeed, as of his deposition in this case, he had never read it. *Id.* at 126:13-15 ("Q With that caveat, have you ever reviewed the document itself? A No.").

- He opened the Agreement and signed it within minutes. Varga Trans. 124:17-125:8; Howell Ex. 2 at 18.
- Twitch, on the other hand, did not countersign the Agreement for nearly a month. Howell Ex. 2 at 19. During this time, Varga still did not take the opportunity to review or ask any questions about the Agreement, suggesting that he had no interest in reviewing it, whether or not he had time to do so. Varga Trans. 126:13-15; *see also Morris*, 128 Cal.App.4th at 1322 ("it is reasonable to expect even an unsophisticated businessman to carefully read, understand, and consider all the terms of an agreement affecting such a vital aspect of his business… Parties to commercial contracts fail to read them at their own peril") (citation omitted).

In short, Varga was presented with an attractive business opportunity. He thought the terms presented sounded "pretty good" (Varga Ex. 2), which they were (Howell Trans. 74:9-17; 142:23-143:1; Varga Trans. 89:22-90:10; 127:14-22), and even negotiated for Twitch to pay what Own3D owed him as a one-time bonus or "sponsorship." *See* Varga Ex. 4; Howell Trans. 116:25-117:11. The fact that Varga signed the Agreement without considering the finer legal points, and without even reviewing to make sure the terms he discussed with Saw and Babo were in the Agreement (which they were), does not render it oppressive. *See, e.g., West v. Henderson* (1991) 227 Cal.App.3d 1578, 1587, *overruled on other grounds by Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169 ("The only oppression on West we perceive in the circumstances surrounding the signing of the lease was ***self-imposed***. West was not in pursuit of life's necessities; this was a business venture. Knowing her own inexperience, she signed the lease without consulting an attorney… and without investigating the suitability of the lease provisions for her business purposes.") (emphasis added).

If Varga had bothered to ask, he would have learned that the contract was negotiable and that there was no pressure to sign it immediately without an opportunity to review. As Howell explained, Twitch used a relatively standard form agreement as a starting point for negotiations with a new partner (Howell Trans. 71:6-8; 77:2-4), but "in general, our agreements were fairly negotiable at the time." Howell Trans. 69:7-8; *see also* 69:7-70:20; 79:20-80:14; 92:8-10; 96:18-97:6; 123:11-20 ("We send an agreement to somebody. They are free to communicate any changes that they would like and then we will make a business decision whether or not to accept those."). For example, Twitch has negotiated financial terms, the term of the agreement, and other terms with other content providers. Howell Trans. 80:7-14, 106:11-14. Howell understood that the limitation of liability provision was also negotiable. Howell Trans. 92:4-10.

When, as here, parties are dealing in an arm's length transaction with an opportunity to accept, reject or modify the terms of the agreement, the contract is not oppressive, "even if there is no actual discussion regarding the provision but rather it is simply proposed and accepted." *Markborough Cal., Inc.*, 227 Cal.App.3d at 715-17 (enforcing $67,640 limitation of liability clause where plaintiff agreed, "whether knowingly or simply because it failed to read the contract, to assume the risk of most of the economic loss."). As explained above, Varga not only had the *opportunity* to accept, reject or modify terms, he *did*, in fact, negotiate certain ones.

Howell confirmed specific terms in the Agreement that Varga negotiated:

> Q. Okay. And in this conversation he's [Varga] asking you if you can include a payment of roughly $8,000 or $7,990 -- $7,990.30, right?
>
> A. Uh-huh.
>
> Q. And you agreed to that, right?
>
> A. Yes. I told him to discuss with Stuart who I had known that he had been negotiating his agreement with.
>
> Q. Okay. And how did you know he was negotiating this agreement with Stuart?

A. Because it was relatively common amongst our group who was managing the negotiation of contacts.

Howell Trans. 116:25-117:11.

Because Varga cannot assert that he took any steps to review or even ask about the Agreement, he instead claims he "felt" such pressure to get the deal done, that he believed he could not take the time to review the Agreement, or later the Amendment, consult counsel, or negotiate their terms. But the evidence undermines that claim – including the basic timeline of events. Varga had at least three days to consider Twitch's offer, had to prompt Twitch to send him the agreement, decided to sign it without even checking to make sure it reflected the terms he'd discussed with Babo and Saw, and even after signing never bothered to review it while waiting for Twitch to countersign.

Contrary to the rushed "vibe" Varga claims he felt, he is unable to identify any specific statements rushing him to sign (Varga Trans. 74:14-23); his contemporaneous account (by email to his brother) only details his discussion with Twitch point by point without mentioning any such statements. But Twitch had a regular practice of negotiating agreements with its partners, and indeed, it even made concessions to Varga in the Agreement, demonstrating its flexibility. *See, e.g.* Varga Ex. 4 (Varga instructs Howell "[j]ust to add on the amount of the $7990.30, I was told I could stream for a few days and that total would be added on."). Varga's own testimony confirms that he was the one who felt urgency to get the deal done, and not Twitch: "sounded like it was the deal, the contract, what I was agreeing to. So when I was issued the contract by Howell, at that point it was like, okay, ***finally I can move forward.***" Varga Trans. 130:21-131:8; *see also* 105:5-7 ("Q Would you say you were eager to start getting paid again? A Definitely. I had bills to pay.").

In sum, Varga had multiple conversations with Twitch prior to receiving the Agreement, including with two of his former colleagues. He claims, without any corroboration, that, "[b]ased on the circumstances and his conversations [sic] and Howell, as well as an early conversation with Stuart Saw and Jason Babo, Varga ***believed*** that he needed to sign the contract quickly and that he would not be provided additional time to review it, effectively denying any possible request he may have made for additional time to review the contract." Varga Ex. 1 at 6. Yet, he cannot

identify any specific statements from Saw, Babo or Howell precluding him from reviewing or negotiating the terms of Agreement or forcing him to sign in a specific amount of time, and his contemporaneous email suggests there were none. Varga never asked Twitch for such an opportunity. The Agreement is not unconscionable merely because Varga did not take the opportunity to review it. Any feelings that Varga had about the urgency to sign the contract as-is were exclusively his own, and do not bear on the conscionability of the Agreement.

b. The Parties Did Not Have Substantially Unequal Bargaining Power

Nor did the parties have substantially unequal bargaining power. "Where the plaintiff is highly sophisticated and the challenged provision does not undermine important public policies, a court might be justified in denying an unconscionability claim for lack of procedural unconscionability even where the provision is within a contract of adhesion." *See Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 585, fn. 8; *see also Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1056, as modified (June 8, 2001) (enforcing indemnification provision in personal injury case that was somewhat one-sided because the signatory "was a sophisticated contractor," had done business with Defendant, and many other crane service companies in the area; "Hence, there was no evidence that [the signatory] had no meaningful choice other than to rent the crane from [the supplier]."). Those circumstances are present here.

In the context of the new industry of video game content streaming, Varga was a major player. After taking college courses in video game programming and design, he started streaming with Own3D, one of Twitch's early competitors, around 2011 when video game streaming was "so new." Varga Trans. 32:1-25; 34:4-14; 35:22-38:14; 48:10-15; 69:21-22; 84:17-19. He was one of the most popular streamers on Own3D, even "before streaming was mainstream." Varga Trans. 65:18-20; 66:7-13. Varga as a "very, very successful content creator" before he joined Twitch. Howell Trans. 132:21-133:7. Varga was able to monetize his video game streaming on Own3D and earned revenue when viewers clicked ads on his page. Varga Trans. 48:10-15 ("You would click an ad button, similar to like a TV commercial; and in your account, you would see

dollar signs").

Varga's financial dealings reflect his experience and stature in the industry. He managed his financial affairs through his own company, PhantomL0rd, Inc. Varga Trans. 50:6-20. Prior to signing on with Twitch, Varga also already had experiencing contracting with Own3D and thus had experience with content provider contracts and deal terms. Varga Trans. 46:12-14. Before and while at Twitch, Varga developed and monetized his own brand, and became a well-known star in the industry. Varga Trans. 67:24-68:20; 65:18-66:13 (describing himself as one of the most popular streamers). He even developed his own logo and merchandise. Varga Trans. 80:9-20; Howell Trans. 132-33. He negotiated "lots" of sponsorship deals with Hewlett Packard ("HP"), which flew Varga to Germany to promote its products, Logitech, which sent him free products, a company called iBUYPOWER, and mobile game developers. He also participated in tournaments by invitation. Varga Trans. 52:16-54:6. Varga admits that he dealt with these companies directly, without consulting attorneys or advisors, other than his brother. Varga Trans. 54:17-22; 55:6-21; 56:3-10; 57:22-58:4; 52:2-53:2; 64:3-4. When he signed the Amendment in 2014, he was considered "top talent" in the market. Howell Trans. 131:19-23.

On the other hand, when Varga entered the Agreement with Twitch, Twitch was a small startup in the nascent video game streaming space, just a few months into its existence, with employees who had similarly limited experience in this new field. Howell Trans. 14:11-20; 26:18-20 ("during this period, we were a relatively small startup"); 93:20-21 ("we were still very, very scrappy as a startup."); 157:9-159:1 (explaining that the founders of Twitch did not have experience in the online gaming industry and that the board of directors, while sophisticated, was not involved in day-to-day decision making). "Similar to most startups," business decisions at Twitch were made by "young entrepreneurs that are navigating their way and trying to learn as they go." *Id.* at 158:2-6.

In short, the parties' relative bargaining power was not vastly disparate. This is not the case of an unsophisticated consumer buying goods from a large corporation, but rather a popular content creator and startup service provider negotiating a premium partner agreement with an added sponsorship fee bonus. Howell Trans. 74:9-14.

c. Varga Had Reasonably Available Alternatives for Streaming His Video Game Play

Even if Varga did not have an opportunity to negotiate the Agreement, Varga also had reasonably available alternatives on which to broadcast his video game play, meaning he had a meaningful choice, and leverage, not to take the agreement "or leave it." *See Morris*, 128 Cal. App. 4th at 1320 (finding, in stark contrast, no choice where a sick patient seeking admittance to a hospital must accept the terms of an admittance form and where employees are not in a position to refuse a job because of an arbitration agreement in an employment contract.).

Darnaa, LLC v. Google LLC, 756 Fed.Appx. 674 (9th Cir. 2018) is directly on point. There, a user sued YouTube for removing its music video and associated view count from the website, alleging that YouTube failed to determine in good faith that the user had manipulated the view count on its music video in violation of YouTube's terms of service. The Court enforced YouTube's limitation of liability provision and dismissed the user's claim in its entirety. It held, "[e]ven though Darnaa had no opportunity to negotiate the terms of the agreement, the degree of procedural unconscionability resulting from its adhesive nature is low. […] A term is not oppressive where, as here, the customer has 'reasonably available alternative sources of supply from which to obtain the desired goods and services free of the terms claimed to be unconscionable.'" *Id.* at 675-76 (citations omitted). Although Darnaa alleged that music industry practices have rendered YouTube the only viable choice for displaying videos, the Court found that "the relevant standard is whether '***reasonably available***' alternatives exist, ***not equally dominant or popular alternatives***." *Id.* (emphasis added) (citations omitted); *see also Song fi, Inc. v. Google Inc.* (D.D.C. 2014) 72 F.Supp.3d 53, 62 (identical contract not procedurally unconscionable because "[p]laintiffs could have publicized [their] video by putting it on various other file-sharing websites or on an independent website"). Importantly, the Court also found that, "Because YouTube offers its video streaming services at no cost to the user," as does Twitch, "it has a valid commercial need to limit liability for actions taken to regulate its platform." *Darnaa,* 756 Fed.Appx. at 676; *accord, Lewis v. YouTube LLC* (2015) 244 Cal.App.4th 118.

Here, as in *Darnaa*, Varga had reasonably available alternatives for broadcasting his video

game play, whether or not those alternatives were as popular in the video-streaming space as Twitch was at the time. Varga could have posted recorded videos of his gameplay on YouTube or other file-sharing websites rather than live streaming them, as he did in practice. *See* Varga Trans. 82:4-8 ("When I was producing contents at Twitch for my live streams, one of the, I guess, streams, the content from that was put onto a YouTube video, and that was my highest View Count of 3.2 million or something like that."). Alternatively, Varga could have explored the "numerous" foreign competitors around in 2012, such as the Japanese platform, NicoNico, or the Korean platform, Afreeka.[3] He could have created an independent website on which to live-stream his video game play. *See Song fi, Inc. v. Google Inc.*, *supra,* 72 F.Supp.3d at 62 ("[p]laintiffs could have publicized [their] video by putting it on … an independent website."). Howell Trans. 35:11-23. Varga also could have continued streaming on Own3D, an existing competitor of Twitch, which was still active at the time Varga joined Twitch and was considering options to be acquired.[4] Varga's options to stream his content on various other platforms precludes a finding of procedural unconscionability.

2. The Agreement Did Not Present Any Surprise

The limitation of liability provision in the Agreement bears no indicia of undue surprise. "Procedural surprise focuses on whether the challenged term is hidden in a prolix printed form or is otherwise beyond the reasonable expectation of the weaker party." *Morris*, 128 Cal.App.4th at 1321 (termination provision in contract not the product of procedural surprise because it was "easily located" in the third sentence under the large type heading). In *Darnaa, LLC v. Google LLC*, the Court found that the limitation of liability provision, "does not bear other indicia of undue surprise, as it is clearly identifiable and printed in all caps." *Darnaa, LLC*, 756 Fed.Appx. at 675–77 (citing *Kilgore v. KeyBank, Nat. Assn.* (9th Cir. 2013) 718 F.3d 1052, 1059).

[3] These platforms had English language services in 2012 and were viable options. While Varga will likely claim that Twitch was his only viable option in the video game streaming space – just as Darnaa alleged with respect to YouTube – the Court must merely find, as the Ninth Circuit did in that case, that "'reasonably available' alternatives exist, not equally dominant or popular alternatives."

[4] https://www.pcgamesn.com/dota/own3d-will-shut-down-within-next-two-weeks-claims-league-legends-streamer

Here, as in *Darnaa*, the limitation of liability provision in the Agreement is in all caps and clearly labeled "Limitation of Liability" in the section titled "Indemnity; Limitations of liability." Howell Ex. 2 at 9-10. The provision is not hidden among unnecessary, lengthy, or small-font text. *Id.* The main terms of the Agreement, excluding exhibits, are contained in a mere seven pages. *Id.; see also Bass v. Facebook, Inc.* (N.D.Cal. June 21, 2019, No. C 18-05982 WHA (JSC)) 2019 WL 2568799, at *9 (finding the limitation of liability clause not unconscionable as the "clause was not buried [and] [t]he clause was plainly above board and contained in clear enough language.") Although Twitch used a form content provider agreement as a starting point for negotiations – which is commonplace in commercial settings like this – there are no indicia of oppression or surprise merely because Varga did not elect to read the seven-page agreement.

B. The Agreement is Not Substantively Unconscionable

Where, as here, "there is no other indication of oppression or surprise, [...] the agreement will be enforceable unless the degree of substantive unconscionability is high." *Serpa v. Cal. Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 704 (quoting *Ajamian v. CantorCO2e* (2012) 203 Cal.App.4th 771, 796). In California, "clauses limiting damages generally are not substantively unconscionable." *Apex Compounding Pharmacy, LLC v. eFax Corporate* (C.D.Cal., Apr. 26, 2018, No. LA CV16-05165 JAK (JPRX), 2018 WL 2589096, at *6 (upholding limitation of liability clause limiting liability to customers or any third parties to $50 for any breach of the customer agreement) (citation omitted). Here, there is no substantive unconscionability, let alone a high degree of it.

Contract terms must be shockingly or extremely one-sided to be substantively unconscionable. *Morris*, 128 Cal.App.4th at 1322 ("A provision is substantively unconscionable if it 'involves contract terms that are so one-sided as to "shock the conscience," or that impose harsh or oppressive terms.'") (citation omitted). When evaluating a provision for unconscionability, "it is important that courts not be thrust in the paternalistic role of intervening to change contractual terms that the parties have agreed to merely because the court believes the terms are unreasonable. ***The terms must shock the conscience.***" *Id.* (citation omitted). Indeed, "[s]ubstantive unconscionability is not concerned with a simple old-fashioned bad

bargain." *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1349.

In *Apex Compounding Pharmacy, LLC*, the plaintiff contended that the customer agreement was substantively unconscionable because it limited liability for any breach of the agreement to ***$50*** and permitted the defendants, but not the plaintiff, to unilaterally amend or change its terms. The Court found that, "the contract provisions Plaintiff alleges are unconscionable—the limited liability provision and the provision governing modification of the contract—'are routine contract terms.'" *Apex Compounding Pharmacy, LLC*, 2018 WL 2589096, at *9 (citation omitted). In *Darnaa, LLC v. Google LLC*, the Court upheld a limitation of liability provision that precluded only the user from recovering damages in any amount. *Darnaa, LLC*, 756 Fed.Appx. at 674; *accord Lewis*, 244 Cal.App.4th at 118 *and Song fi, Inc.*, 72 F.Supp.3d at 63. It held, "a contract can provide a 'margin of safety' that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable… Because YouTube offers its video streaming services at no cost to the user, it has a valid commercial need to limit liability for actions taken to regulate its platform." *Darnaa, LLC,* 756 Fed.Appx. at 676 (citations omitted).

1. The Limitation of Liability Provision Applies to Both Parties

The contract terms here are even-handed, not one-sided. Twitch provides free services both to content providers, like Varga, and users to stream and view content (with some content available on a subscription basis, and giving partners an opportunity to earn revenue from subscriptions and ad views). Like YouTube, Twitch has a valid commercial need to limit liability for actions taken to regulate its platform—the exact basis of this lawsuit, which stems from Twitch terminating Varga after a series of inappropriate streams culminating in a scheme to harm Twitch users. Twitch should not be subject to unlimited liability for its action to protect its user community.

Unlike YouTube, however, the limitation of liability provision here is less one-sided because it applies mutually to both parties and does not limit all damages, but rather caps them. Howell Ex. 2 at 9-10. In fact, all the relevant terms of the Agreement apply mutually to both

parties (limitation of liability, indemnity, confidentiality), except the financial terms, which benefitted Varga more than Twitch. *Id.* at 8-10; Howell Trans. 136:15-18; 106:22:107:2 (Q "Just like the limitation on liability would potentially limit the amount of liability at Twitch, right?" A "***It also limits the liability of the other party as well.***"). Varga does not, and cannot, contend that the indemnification or confidentiality provisions have been enforced in a one-sided manner by Twitch against him. Howell testified that the only confidential information he recalls Twitch giving to Varga was the Agreement itself (Howell Trans. 110:2-4); "it's just a common practice to not to share confidential business information… even under the [confidentiality] terms." *Id.* at 110:22-111:5.

The limitation of liability provision is plainly two-sided. The Agreement, overall, is also mutually beneficial, except to the extent it actually favors Varga. Howell testified, for example, that the financial terms benefitted Varga more than Twitch: "Twitch was not cash flow positive with the first arrangement with Mr. Varga, for example. That was a money losing deal for Twitch at that point in our lifespan." Nonetheless, when it came time to renew the Agreement in 2014, Twitch maintained this arrangement instead of switching Varga to its modified fee structure, "because that was more beneficial for him [Varga]." Howell Trans. 144:10-13; 138:22-139:13. The limitation of liability provision read on its own, and in the context of the full Agreement, benefits both parties mutually and simply does not "shock the conscience."

2. The Limitation of Liability Provisions is Reasonable in Light of the Contract's Revenue Structure

Varga's counsel has suggested that the limitation of liability provision is unconscionable because the $50,000 limitation is less than the *total* amount of revenue Varga earned from his streaming on Twitch over four years. Howell Trans. 101:6-10 ("So let me ask you this, is it your opinion that if Twitch failed to pay Mr. Varga any of these $572,000, that under, what we just showed you, 8.4, the limitation of liability, that Twitch's liability would be capped at $50,000."). This reasoning assumes incorrect facts and relies on the wrong legal standard. Twitch has paid Varga everything he was owed under the Agreement for his streaming; historical payments by Twitch to Varga are not at issue in this matter. Varga Trans. 139:20-140:22; 141:13-25. Even if

this were at issue, $50,000 equates to several months of Varga's earnings, and thus would have given Varga sufficient runway to challenge an incident of late or nonpayment, had there been any, which there was not.

Furthermore, this argument about the reasonableness of the mutual $50,000 cap is misplaced. It assumes that the limitation of liability provision is a liquidated damages clause, which it is not. A limitation of liability is designed to protect the *wrongdoer defendant* from unlimited liability, whereas a liquidated damages provision is usually inserted into a contract for the benefit of the prospective aggrieved plaintiff. With respect to a limitation of liability, there is no requirement that the damages be difficult to ascertain, and no fixed sum is recoverable; actual damages, ***within the limited amount***, must be proved. *See Western Union Telegraph Co. v. Nester* (1940) 309 U.S. 582, 589 (60 S.Ct. 769, 772). Here, because the limitation of liability is bilateral and *caps* damages at $50,000, rather than *fixing* them at $50,000, the provision is not a liquidated damages provision. *Id.*

IV. CONCLUSION

For the reasons set forth above, Defendant and Cross-Complainant Twitch Interactive, Inc. respectfully submits that the limitation of liability clause contained in the Agreement is not unconscionable and should be enforced.

Dated: July 30, 2019

Respectfully Submitted,

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TWITCH INTERACTIVE, INC.

PROOF OF SERVICE

Varga v. Twitch Interactive, Inc.,
San Francisco County Superior Court Case No. CGC-18-564337

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Davis Wright Tremaine LLP, 505 Montgomery Street, Suite 800, San Francisco, CA 94111. On the below-mentioned date, I served the within documents:

DEFENDANT AND CROSS-COMPLAINANT TWITCH INTERACTIVE INC.'S TRIAL BRIEF

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on July 30, 2019 at San Francisco, California.

Kimberly Greene